Sun Kam Heng v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–123–89
MOHAMED AZMI, PEH SWEE CHIN AND EDGAR JOSEPH JR SCJJ
19 NOVEMBER 1992

Evidence *— Chain of evidence — Unlawful possession of revolver and ammunition — Revolver and ammunition seized by police — Break in chain of evidence — Internal Security Act 1960 s 57(1)(a) & 57(1)(f)*

The appellant had been charged in the High Court for possession of unlawful firearm and unlawful possession of ammunition, offences under the Internal Security Act 1960 ('the Act'). He was convicted of both the charges and sentenced to death, that being the mandatory sentence prescribed by s 57(1) of the Act. He appealed to the Supreme Court. It was submitted on behalf of the appellant that: (a) self-contradictory evidence was given by one of the arresting officers in first using the word 'pistol' and then the word 'revolver' when referring to what he had snatched from the hand of the appellant; and (b) none of the arresting officers had marked the weapon with an appropriate endorsement, duly initialled or signed, authenticating the seizure. These omissions became significant as the weapon bears no serial number and there was a conflict of evidence as to who snatched the weapon from the appellant. Moreover, although it was the case for the prosecution that the weapon containing ammunition was snatched by the police from the hand of the appellant on the day he was stopped and arrested, that is on 18 January 1987 and the evidence showed that it was sent to the armourer on 21 January 1987 for examination and then later to the government chemist, in the intervening three days (between 18 and 21 January 1987), it had been lying in the safe of DSP Bahadom. However DSP Bahadom was neither called nor even offered by the prosecution to the defence although he was apparently available.

Held, allowing the appeal:

(1) The burden was upon the prosecution from beginning to end to prove beyond a reasonable doubt that the subject matter of the charges, being the revolver with the ammunition in it, which had been produced in the court below was the very thing described as a revolver, which had been snatched from the hand of the appellant on the day and at the time and place mentioned in the charges.

(2) There was a break in the chain of evidence relating to the retention of what was described as a revolver which had been snatched from the hand of the appellant, during the crucial three days when it was allegedly lying in the safe of DSP Bahadom. The testimony of the armourer and the report of the chemist would therefore

A have to be disregarded as being irrelevant to the charges, because of the earlier break in the chain of evidence.

[Bahasa Malaysia summary

Perayu telah dituduh di Mahkamah Tinggi kerana memiliki senjata B api menyalahi undang-undang dan memiliki amunisi menyalahi undang -undang, kesalahan di bawah Akta Keselamatan Dalam Negeri 1960 ('Akta itu'). Beliau telah disabitkan bersalah atas kedua-dua tuduhan itu dan dihukum mati, kerana hukuman itu adalah hukuman mandatori di bawah s 57(1) Akta itu. Beliau telah merayu kepada Mahkamah C Agung.

Telah dihujahkan bagi pihak perayu bahawa: (a) keterangan yang bercanggah telah diberi oleh seorang daripada pegawai polis yang telah menahan perayu dengan pada mulanya menggunakan perkataan 'pistol' dan kemudiannya perkataan 'revolver' apabila merujuk kepada apa yang telah dirampas dari tangan perayu; dan (b) tidak satupun D daripada pegawai polis yang menahan perayu yang telah menandakan senjata itu dengan pengendorsan yang sesuai, diparapi atau ditanda-tangani seperti yang sepatutnya, mengesahkan perampasan itu. Peninggalan ini menjadi penting kerana senjata itu tidak mempunyai nombor bersiri dan terdapat keterangan bercanggah tentang siapa yang telah merampas senjata itu daripada perayu. Tambahan pula, E walaupun menjadi kes bagi pihak pendakwa bahawa senjata yang mengandungi amunisi itu telah dirampas oleh polis dari tangan perayu pada hari beliau telah ditahan dan ditangkap, iaitu pada 18 Januari 1987, dan keterangan menunjukkan bahawa ia telah dihantar kepada amra pada 21 Januari 1987 untuk diperiksa dan kemudiannya kepada F ahli kimia kerajaan, dalam tempoh tiga hari yang berselang itu (di antara 18 dan 21 Januari 1987), ia telah disimpan di dalam peti besi DSP Bahadom. Tetapi DSP Bahadom tidak dipanggil ataupun ditawar-kan oleh pihak pendakwa kepada pihak pembela walaupun beliau nampaknya boleh didapati.

G **Diputuskan**, membenarkan rayuan itu:

(1) Beban adalah pada pihak pendakwa dari awal hingga akhir untuk membuktikan melampaui keraguan yang munasabah bahawa perkara tuduhan, iaitu revolver dengan amunisi di dalamnya, yang telah dikemukakan dalam mahkamah di bawah adalah perkara H yang telah digambarkan sebagai revolver, yang telah dirampas dari tangan perayu pada hari dan pada masa dan tempat yang disebut di dalam tuduhan itu.

(2) Rangkaian keterangan terputus mengenai penahanan apa yang telah digambarkan sebagai revolver yang telah dirampas dari tangan perayu, pada tiga hari yang penting di mana ia telah dikatakan I berada di dalam peti besi DSP Bahadom. Testimoni amra dan laporan ahli kimia terpaksa tidak dpedulikan kerana tidak relevan dengan tuduhan itu, disebabkan terputusnya rangkaian keterangan yang lebih awal itu.]

Legislation referred to
Internal Security Act 1960 ss 57(1)(a), 57(a)(f)

Appeal from: Criminal Trial No 57–1–87 (High Court, Kuala Lumpur)

Gurbachan Singh (*Bachan & Kartar*) for the appellant.
Suriyadi bin Halim Omar (Deputy Public Prosecuter) for the respondent.

Cur Adv Vult

Edgar Joseph Jr SCJ (delivering the judgment of the court): This appellant was prosecuted in the High Court of the Federal Territory upon the following two charges:

First charge:

That you on 18 January 1987 at about 12.40pm at Jalan Sultan Abdul Samad, Brickfields, in the City of Kuala Lumpur, in the Federal Territory, being a security area as proclaimed by the Yang di-Pertuan Agong vide PU (A) 148 dated 15 May 1969, without lawful excuse and lawful authority did have in your possession a firearm, to wit, one .38 Smith and Wesson Special (Model 36) without serial numbers and that you have thereby contravened s 57(1)(a) of the Internal Security Act 1960 (Rev 1972) and punishable under s 57(1) of the said Act.

Second charge:

That you on 18 January 1987 at about 12.40pm at Jalan Sultan Abdul Samad, Brickfields, in the city of Kuala Lumpur, in the Federal Territory, being a security area as proclaimed by the Yang di-Pertuan Agong vide PU (A) 148 dated 15 May 1969 without lawful excuse and without lawful authority did have in your possession one round of .38 special ammunition and that you have thereby contravened s 57(1)(b) of the Internal Security Act 1960 (Rev 1972) and punishable under s 57(1) of the said Act.

In the event, he was convicted of both the charges and sentenced to death, that being the mandatory sentence, prescribed by s 57(1) of the Internal Security Act 1960 ('the Act').

He then appealed against these convictions.

Before us, the convictions were attacked solely on one ground, and that revolved around the critical question, whether it had been proved beyond reasonable doubt that the revolver (exh P3) and ammunition (P9B) produced in the court below, which constituted the subject matter of the first and second charges, respectively, were, what was snatched from the hand of the appellant on the date, and at the time and place referred to in the charges.

Now, the whole of the material evidence in the case for the prosecution had been carefully and critically examined before us and we do not consider it necessary to recapitulate the evidence at length but, briefly, according to that evidence, the appellant was arrested within minutes after a robbery at gun point, the victim of the robbery being one Ong Chee Kew (PW1), who was set upon by the robber as he was about to open the door of his car just

outside his home at Jalan Abdul Samad, Brickfields, Kuala Lumpur and relieved of his wrist watch, gold chain and wallet.

Having snatched these personal effects, the robber took to his heels pursued by Ong who, by any standards, was a man of unusual courage and firmness. The robber was said to have fired three shots at Ong during the pursuit, one of which grazed his head. The robber then managed to stop a passing motor car, described as 'a yellow car' — got into it and again, at gun point, forced its driver, one Tan Chee Kean (PW2), to drive off.

Some 200m away, at Jalan Padang Belia, Brickfields, a fat male Malay — later identified as Cons Shamsuddin bin Setar (PW3), who happened to be at the scene with his superiors, Insp Abdul Manan and Sgt Manaf, having been alerted by some members of the public as to what was happening, drew his revolver and pointed it at Tan in an attempt to stop him, but understandably, Tan had no choice but to continue driving; as he did so, the robber shot once at Shamsuddin, but missed.

Inspector Abdul Manan then pursued the yellow car through Jalan Tun Sambanthan Tiga into Jalan Sambanthan, and then into Jalan Travers where, with the help of Police Constable Richards, who also happened to be at the scene riding his motor cycle, he managed to stop the yellow car.

According to Insp Manan, PC Richards then opened the driver's door of the yellow car and the driver Tan pointed to the robber who was in a stooping position in the rear seat. The latter then straightened up and 'pointed a *pistol*' at him. But added Manan, 'I then snatched the *pistol* from his hand'.

He then positively identified the appellant as the man from whom he said he had seized the pistol, and added:

> I had examined the *revolver* which I seized from the accused. It was a Smith and Wesson .38, three inch barrel. There was no serial number on it ... I found four empty shells and one bullet which had been fired but did not explode. On the same day, I handed over the exhibits I recovered to Insp Stanley. He acknowledged the handing over by signing on the receipt (P6).

Going back a little, the appellant was also positively identified by Ong as the person who had robbed him of his personal effects aforesaid.

We must now embark upon a consideration of the submissions advanced on behalf of the appellant.

Firstly, it was argued that Insp Manan had first used the word 'pistol' and then the word 'revolver' — a horse of a different colour — when referring to what he had snatched from the hand of the appellant, so that his testimony was self-contradictory on an essential part of the case for the prosecution, but we did not place undue stress on the point and mention it only in passing, having regard to other far more important questions which arose for our consideration, which we shall next be discussing.

The appellant was on firmer ground when it was argued on his behalf that, neither Manan nor any of his colleagues with him, had made any mark on the weapon described as a revolver snatched from the appellant's hand; for eg, a scratch mark, nor was it enclosed in a sealed envelope, with an appropriate endorsement thereon duly initialled or signed, authenticating the seizure. These omissions became significant, bearing in mind that the

revolver produced in the court below bore no serial number and, what was more, there was a conflict of evidence as to who actually snatched the weapon described as a revolver from the hand of the appellant; Insp Manan maintained that he did so, but according to the testimony of Tan, it was Richards, who having pulled the appellant out of the car, tried to wrest it from the appellant's hand and with the assistance of Sgt Manaf and another man, succeeded in doing so.

However, the real point in this appeal was that although it was the case for the prosecution that the revolver which had been snatched from the appellant's hand on 18 January 1987, had been sent to the armourer ASP Haji Ishak on 21 January 1987 for examination and report, and later to the government chemist, it had, during the intervening three days, that is to say, between 18 and 21 January 1987, been lying in the safe of the superior of ASP Haji Ishak, a certain DSP Bahadom, yet the latter was neither called nor even offered by the prosecution to the defence though he was apparently available.

Under cross-examination by counsel for the appellant in the court below, ASP Haji Ishak claimed that the only revolver kept in the safe of DSP Bahadom was P3, with the ammunition (P9B) in it, and that the key to the safe was held exclusively by DSP Bahadom. This claim by ASP Haji Ishak was virtually worthless as evidence being plainly hearsay, DSP Bahadom not having been called. It was not suggested that what was described as a revolver, which had been snatched from the hand of the appellant, had been enclosed in a sealed envelope, when placed in the safe nor was the safe register produced to demonstrate to the court beyond a reasonable doubt what, if anything else, the safe contained during the crucial three days.

It is true that the revolver, P3, and ammunition in it, being the four empty casings (P9A) and one round of .38 ammunition which had misfired (P9B), were enclosed in two separate envelopes, being P4 and P9 respectively, which were sealed by the investigating officer — Insp Stanley Ringgit (PW6) — and sent to the armourer ASP Haji Ishak for test firing but these acts of enclosing, sealing and sending occurred on 21 January 1987, that is to say, *after* the three crucial days. Similarly, after test firing, Stanley Ringgit did receive these exhibits from the armourer on 27 January 1987, in a sealed envelope, and later — on 5 February 1987 — had sent them to the government chemist in three sealed envelopes, also for test firing and eventually, on 22 August 1987, they were returned to him also in three sealed enveloped.

It follows, therefore, that all this evidence regarding the movements of the revolver (P3), and the ammunition (P9B), was when they were on their way to the armourer and the chemist, and then back to the investigating officer and does nothing to repair the gap in the case for the prosecution, regarding the whereabouts of the weapon described as a revolver; snatched from the hand of the appellant, during the crucial three days when it was allegedly lying in the safe of DSP Bahadom. We repeat, it was only this latter part of the evidence which came under heavy attack by the defence not only here but in the court below, as well. Yet as we have already noted, DSP Bahadom was neither called nor even offered by the prosecution nor any explanation vouchsafed either here or below for these glaring omis-

A sions. Before us, therefore, the questions of critical substance which arose for decision was whether the prosecution evidence regarding this part of the case could withstand the attack by counsel for the appellant.

It goes without saying that the burden was upon the prosecution from beginning to end and from first to last to prove beyond a reasonable doubt that the subject matter of the charges, being the revolver (P3) with the B ammunition in it (P9B), which had been produced in the court below was the very thing described as a revolver, which had been snatched from the hand of the appellant on the date and at the time and place mentioned in the charges.

We would add that the entire expert testimony of the armourer and the C report of the government chemist had been directed towards establishing that the revolver and the ammunition in it, being exhs P3 and P9B, came within the expression 'firearm' and 'ammunition', respectively, as defined in s 2 of the Act (Rev 1974).

If therefore, there was a break in the chain of evidence relating to the retention of what was described as a revolver, which had been snatched D from the hand of the appellant, at any time *before* it was allegedly sent to the armourer; in particular, during the crucial three days when it was allegedly lying in the safe of DSP Bahadom, then the testimony of the armourer and the report of the chemist would have to be disregarded as being irrelevant to the charges.

E In the particular circumstances of the present case, we consider that without the testimony of the armourer and the report of the chemist, there would be insufficient evidence that what had been snatched from the hand of the appellant came within the expression 'firearm' and 'ammunition' as defined in s 2 of the Act.

Finally, we detect nothing in the grounds of judgment of the learned F judge to indicate that he had directed his attention to the infirmities aforesaid in the case for the prosecution.

For the reasons stated, although it was utterly regrettable that the appellant should succeed in his appeal, the principle involved was more important than the case itself, and so, with considerable regret, we had no option G but to allow the appeal, quash the convictions, set aside the sentences and record orders of acquittal and discharge. The Public Prosecutor will, no doubt, exercise his own discretion as to what action he thinks fit to take.

Appeal allowed.

H Reported by Prof Ahmad Ibrahim

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